KEMAYAN CORPORATION BHD & ORS

v.

AFFIN DISCOUNT BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[ORIGINATING SUMMONS NO: D5-24-350-1998]
29 JANUARY 2003

COMPANY LAW: *Arrangements and reconstructions - Restraining order - Extension of - Whether ought to be granted - Companies Act 1965, s. 176(1), (10)*

COMPANY LAW: *Arrangements and reconstructions - Meetings - Order to convene meeting between company and shareholders - Extension of - Whether ought to be granted - Companies Act 1965, s. 176(1), (10)*

This was an application by the petitioners under s. 176 of the Companies Act 1965 ('the Act') that the meeting between the applicants and their shareholders, which was extended to be held on or before 3 June 2002, be further extended to be held on or before 31 December 2002 or on a date as ordered by the court, and that the first applicant be given the liberty to fix the date and place of the said shareholders' meeting. They also applied for the restraining and stay order, which was extended to expire on 3 June 2002 *vide* court order dated 13 December 2001, be further extended to expire on 31 December 2002.

Held:

[1] On the facts, the order to convene the meeting with their shareholders and the restraining order had been in existence since 12 August 1998 and despite the many extensions obtained by the applicants, they had failed, to date, to come up with a firm compromise or arrangement, or for that matter, any semblance of one. It was clear that the proposed scheme of arrangement and compromise had failed and the applicants were now attempting in this application to merely keep the original restraining order under s. 176(10) of the Act obtained some four years back operative until such time as they were able to find such persons who were prepared to inject assets into the companies in a scheme of arrangement which they would then submit for approval to the relevant authorities and their shareholders and creditors. This, unfortunately, was not the object of s. 176 of the Act. (p 433 b-e)

[2] It followed that both the order to convene the meeting under s. 176(1) of the Act and the restraining order under s. 176(10) of the Act were good only for the original purpose for which they were granted based on the proposed compromise or arrangement which was put before the court then. Therefore, it was an abuse of the process of the court bordering on contempt for the applicants to apply for extension of the orders when the proposed arrangement or compromise had failed. If they were desirous of entering into a new arrangement or compromise as they were now attempting to do, it would be incumbent upon the applicants to submit a new proposal to the court setting out the viability of the scheme which they had in mind for its consideration. (p 434 c-d)

[3] Even assuming that s. 176 of the Act does allow the applicants to apply for an extension of the meeting of creditors or shareholders notwithstanding that the proposed compromise or arrangement had fallen through, there was hardly any reason to allow any further extension in this case as the applicants had failed to reach any arrangement or compromise after some four years. To allow the extension would tantamount to providing unlimited protection to the applicants contrary to the purport of s. 176 of the Act to the prejudice of its own shareholders and its creditors. (p 434 e-g)

[Application dismissed.]

Case(s) referred to:
Re GAE Pty Ltd [1962] VR 252 ***(foll)***
Re Kuala Lumpur Industries Bhd & Ors [1991] 3 CLJ 2867; [1991] 3 CLJ (Rep) 86 HC ***(foll)***

Legislation referred to:
Companies Act 1965, s. 176(1), (10), (10A)
Rules of the High Court 1980, O. 62 r. 5

For the applicants - Surinder Singh Gill; M/s Megat Najmuddin Leong & Co
For the 1st respondent - Jayanthi Pillay; M/s Kadir, Andri Aidham & Partners
For the 3rd respondent - Natasha; M/s Shearn Delamore & Co

Reported by Suresh Nathan

JUDGMENT

Kang Hwee Gee J:
This is an application by the petitioners under s. 176 of the Companies Act 1965 for the following orders:

1. that the meeting between Kemayan Corporation Berhad (1st applicant abovenamed) and the 1st applicant's shareholders which was extended to

be held on or before 3 June 2002 be further extended to be held on or before 31 December 2002 or on a date as ordered by the court between 9am and 5pm and that the 1st applicant be given the liberty to fix the date and place of the said shareholders's meeting.

2. that the restraining and stay order which was extended to expire on 3 June 2002 *vide* court order dated 13 December 2001 be further extended to expire on 31 December 2002 except with the leave of this honourable court and subject to the following conditions:

   a) that the respective chargors (the applicants) of the secured properties as defined in the guarantee facility agreement dated 13 February 1995 shall give their consent to allow the guarantor banks as represented by the 1st respondent as chargee, to dispose off the secured properties at a price to be determined by the guarantor banks.

   b) that the 1st applicant and the respective chargors (the respective applicants) shall further do all that may be necessary including making the necessary applications to court to effect the sale of the secured properties as stated in para. 2(a) of this order;

   c) that the 3rd respondent is exempted from this extension and any other order or extension of this restraining order.

3. that pursuant to O. 62 r. 5 of the Rules of the High Court, 1980, the service of a photostat copy of this order upon all persons affected by this order, by way of prepaid registered post addressed to their last known address and in the event such persons are incorporated bodies, upon such incorporated bodies or their directors and/or officers, by way of pre-paid registered post addressed to the head or principal office of such incorporated bodies and by advertising this order herein, once in English in "The New Straits Times" newspaper and once in the "Berita Harian" newspaper shall be good and sufficient service of the order herein; and

4. Such further or other orders as this Honourable Court deems fit and necessary.

3. That the said applicants be and are hereby given the liberty to apply whether jointly and/or separately.

The basis for making this application and the background relating thereto is stated in the affidavit of Rickie Tang Yong Kiat (in encl. 190) as follows:

1. The 1st applicant is an affected listed issuer under Practice Note 4/2001 issued by the Kuala Lumpur Stock Exchange (KLSE).

2. On 16 September 2001, the 1st applicant had executed a memorandum of understanding with Mr Lai Kwai Weng, Datuk Umar Haji Abu and Haji Ismail Bin Daut (hereinafter collectively referred to as "the White Knights") whereby the White Knights will propose a scheme whereby they would inject assets, formulate and propose a revised restructured scheme of arrangement for the applicants.

3. However, the above memorandum of understanding was no longer viable due to requirements being imposed by the relevant authorities in January, 2002. As such the 1st applicant had to source for new assets for the restructuring.

4. On 19 February 2002, the 1st applicant executed a memorandum of understanding with Ismail Bin Othman, (hereinafter referred to as the "White Knight") and Duta Nilai Holdings Sdn Bhd, Mohd Razip Bin Hamzah and Haider Bin Othaman (hereinafter referred to as the "proprietor") who are desirous of proposing a debt restructuring scheme with the injection of income generating assets and formulating a revised restructured scheme of arrangement for the applicants.

5. The 1st applicant is awaiting comments and approval in principal from Danaharta and the consortium of financial institutions before the proposed scheme can be presented to other major creditors.

6. The proposed restructuring scheme required substantial waivers by creditors and due to a large number of lenders and creditors, the 1st applicant requires time for:

   a. presenting and negotiating with creditors;

   b. solicitors to prepare all legal documentations; and

   c. the corporate advisor to prepare the submission to Foreign Investment Committee, Securities Commission and KLSE.

7. The pending negotiations between the 1st applicant and the white knight is the only means of securing new assets for injection and the only way for revising the proposed scheme of arrangement whereby the creditors of the applicants can recover. In the event that the restructuring order is not further extended, the minority dissenting creditors may frustrate the scheme of arrangement and the pending negotiations with the white knight by instituting legal proceedings against the applicants to the detriment of other creditors and shareholders of the applicants.

8. Therefore prior to the holding of the shareholders meeting, the applicants need to *inter alia* obtain the sanction of this honourable court. In the circumstances the said restraining and stay order which expires on 3 June 2002 needs to be further extended to expire on 31 December 2002.

The application is opposed by the 1st respondent Affin Discount Berhad *vide* the affidavit of its deputy chief executive officer which read as follows:

1. I am the deputy chief executive officer of the 1st respondent and am duly authorised to affirm this affidavit for and on behalf of the 1st respondent.

2. The facts deposed to herein are within my personal knowledge and/or are derived from the records of the 1st respondent to which I have access.

3. I crave leave of this Honourable Court to refer to the Summons-In-Chambers dated 24th May 2002 ("the Applicants application") and the Affidavit in support affirmed by Dato' Ricky Tang Yong Kiat on 23rd May 2002 ("Dato Ricky's Affidavit").

4. The Applicants' application seeks *inter alia* for an order to extend the Restraining and Stay Order which was to expire on 3rd June 2002 to 31st December 2002.

5. I am informed by my Solicitors that the Applicants have obtained an interim Restraining Order from 3rd June 2002 to 11th July 2002 until the date of hearing of the Applicants' application.

6. The 1st Respondent is the Manager and Agent under a Guarantee Facility Agreement ("the GFA") dated 13th February 1996 entered into together with the 1st Applicant abovenamed and the Guarantors under the GFA who are made up of a group of banks and financial institutions.

7. Pursuant to the terms of the GFA, the Guarantors agreed to make available to the 1st Applicant, a guarantee facility up to the maximum sum of RM184,950,000.00 pursuant to which the Guarantors agreed to guarantee, in accordance with the terms and conditions set out in a Trust Deed dated 13th February 1996, the payment obligations of the 1st Applicant in connection with the Bonds issued by the 1st Applicant.

8. An event of default as stipulated under the terms of the GFA has occurred following which a demand was made on the Guarantors in the sum of RM184,950,000.00 as at 27th February 1999.

9. I affirm this Affidavit as the 1st Respondent is opposed to the Applicants' application for reasons that will hereafter be set out.

10. The Applicants obtained from this Honourable Court a Restraining and Stay Order ("the RO") on 12th August 1998 which *inter alia* states as follows:

    (i) Any and/or all of the Applicants' Creditors and/or shareholders are prohibited whether by themselves and/or through their agents and/or through their employees from commencing and/or issuing and/or taking and/or suing and/or continuing with any action and/or proceedings on any or all the Applicants and/or their guarantors and/or on any securities and/or in any capacity including but not limited to the actions and/or proceedings of winding-up, receivership, execution, and/or arbitration proceedings and/or selling of any securities pledged to any parties and also any action and/or proceedings intended or which will arise in the future be restrained and stayed except with the leave of this Honourable Court subject to the terms imposed by this Honourable Court (hereinafter referred to as the "Restraining and Stay Order") and that the Restraining and Stay Order be valid pending the approval of the proposed scheme by the Court or until further order of this Honourable Court; and

    (ii) The said Restraining and Stay Order shall be applicable and valid for a period of 9 months from the date of this Order notwithstanding any law or any laws or judgment, and shall bind any parties involved who are not parties to this proceedings, or in any other connected proceedings.

    Annexed herewith is a true copy of the said Order marked as Exhibit "KAAP-1".

11. The said Order marked as Exhibit "KAAP-1" also required the Applicants to convene meetings with its various classes of creditors to consider and if through fit, to approve a scheme of arrangement put forward by the Applicants to its creditors.

12. The time to hold the said court-convened meetings was subsequently extended from time to time and the meeting was finally held on 4th August 1999 between the 1st Applicant and its creditors of whom included the Guarantors.

13. The scheme of arrangement proposed between the Guarantors and the 1st Respondent was then approved by the Guarantors.

14. The Applicants then sought to obtain the approvals of the various authorities such as the Securities Commission ("the SC") who had raised several issues pertaining to the scheme. Annexed herewith is a copy of a letter dated 17th May 2000 marked as Exhibit "KAAP-2" from the SC addressed to Utama Merchant Bank who were the then advisers to the scheme for the Applicants.

15. I verily believe that the said letter from the SC required from the Applicants a new scheme which was to be more comprehensive for the SC to consider giving its approval. I further verily believe that the SC had thereby rejected the scheme that had been put forward to the creditors of the Applicants and which was approved by the said creditors.

16. I verily believe that since the SC's letter of 17th May 2000, the Applicants have todate, some 2 years later failed to come up with a revised scheme which is acceptable to the creditors for their consideration.

17. I am advised by my Solicitors and verily believe that the Applicants are now required to convene a meeting with its various classes of creditors so that a revised scheme of arrangement may be put forward for their consideration and to be voted upon.

18. Notwithstanding the above, the Applicants' application does not seek to ask this Honourable Court to convene a meeting of the creditors of the Applicants.

19. The Applicants have failed to formulate a scheme of arrangement with its creditors but seeks to ask this Honourable Court for continued protection under the relevant sections of the Companies Act.

20. I am advised by my Solicitors and verily believe that since 12th August 1998, the Applicants have made numerous applications to this Honourable Court to extend the Restraining Order. By various Orders including interim orders granted by this Honourable Court, the Restraining Order has been extended a total of 23 times.

21. The 1st Respondent represents the Guarantors who are a group of secured lenders who are owed a principal sum as at 31st May 2002 of RM146,070,318.55 and default interest thereon at the rate of 2% plus BLR for BAFIA Guarantors and 2% plus cost of funds for the offshore Guarantors from the period beginning 28/2/1999 and continuing thereon.

22. The Guarantors are presently holding security which, based on open market values, represents 102.55% of the total principal sum due from the 1st Applicant.

23. The Guarantors are keen to enforce their security for which they have been unfairly restrained from doing so since 12th August 1998.

24. I am also informed and verily believe that the 1st Applicant has recently put forward to the Guarantors a proposed scheme, the terms of which I verily believe are not to the satisfaction of the Guarantors.

25. I further verily believe that the Applicants' application is unfair and prejudicial to the 1st Respondent and to the group of Guarantors and therefore urge this Honourable Court to dismiss the Applicants' application with costs.

The affidavit in reply (encl. 197) of Rickie Tang Yong Kiat reads as follows:

1. I am a Director of the 1st Applicant Company and I have knowledge of dealings of the said Company and its subsidiaries in this matter. I have been duly authorised by the Board of Directors of the 1st Applicant abovenamed to affirm this Affidavit for and on behalf of all the said Applicants.

2. Save where otherwise stated, the matters deposed herein are to best of my personal knowledge, information and belief and/or from records of the said applicants to which I have access.

3. I crave leave of this Honourable Court to refer to the Affidavit In Reply affirmed by Wan Kamarul Zaman Wan Yaacob on the 10th of July, 2002 ("Wan Kamarul's Affidavit").

4. In reply to paragraphs 15 and 16 of Wan Kamarul's Affidavit I state that the Securities Commission ("SC") has never rejected the Applicants Scheme.

   4.1 I further state that the SC has never required the Applicants to come up with a new but a revised scheme which is comprehensive.

   4.2 The Applicants were delayed in formulating a revised restructuring scheme due to following factors beyond their control namely:

      4.2.1 prevailing market conditions.

      4.2.2 11th September tragedy.

      4.2.3 the size of the Applicants debts.

      4.2.4 difficulties in securing suitable White Knights to agree to the demands made by the 1st and 2nd Applicants.

   4.3 In view of the above sequence of events it is inevitable that the Applicants plan to revise the restructuring scheme and present the same for the approval of the Applicants' creditors.

5. In reply to paragraphs 17 and 18 of Wan Kamarul's Affidavit the Applicants state that the Applicants through its merchant bankers has finalised the revised restructuring scheme after a series of negotiations and discussions with Danaharta, the Company and the White Knights. [Is there any evidence of this, can we exhibit any documents?]

5.1 The Applicants verily believe that the revised restructuring scheme will be approved in principle within the next three (3) weeks.

5.2 Upon approval of the revised restructuring scheme the Applicants would proceed to commence a meeting of the creditors of the Applicants for its approval.

6. The Applicants have finalised the revised scheme pending approval in principle from Danaharta and the Guarantor.

6.1 The Application for extension of the Restraining Order is to facilitate the restructuring process during the next 6 months.

6.2 The extension sought is in line with Kuala Lumpur Stock Exchange policies for PN. 4 Companies to complete restructuring work by end of December, 2002 with the Restructuring Order extended to 31/12/2002. This is to assure the White Knights that during this period there will be no threat from creditors filing winding-up orders under s. 218 of the Companies Act 1965 while all parties are still in the process of negotiating, formulating and submitting the restructuring scheme to the relevant authorities.

6.3 Therefore the Applicant denies that they have failed to formulate a scheme of arrangement while seeking continued extension of the Restraining Order.

7. In reply to paragraph 20 of the Wan Kamarul's Affidavit I state that from our records there has been only fifteen (15) extensions of the restraining order inclusive of the interim restraining order.

7.1 The reason for the extensions have been stated in the various Affidavits filed in support of each extension.

7.2 I further like to bring this Honourable Courts attention to the fact that there are approximately 100 listed Companies under the PN 4 category and all the companies are in different stage of restructuring. The Applicant is a huge group of companies that has many classes of creditors and larger debts.

8. The Applicant further states that the 1st Respondent has not been unfairly restrained from enforcing their securities pursuant to the extended restraining Orders as for the following reasons:

a) The 1st Applicant had made an application to the High Court for the disposal of 3,892.55 acres of plantation charged to the 1st Respondent on the 20/7/2000 and 27/9/2001 in respect of two (2) different purchasers.

b) The Restraining Order dated 2/8/2001 and 3/12/2001 have allowed the 1st Respondent to dispose off securities charged to them at prices to be solely determined by the Guarantors.

c) On the 3/6/2002, the 1st Respondent, the 1st Applicant and a potential purchaser recommended by the Guarantors signed a Memorandum of Agreement ("MOA") for the disposal of Menara Kemayan. This MOA has not materialised into a sale and purchase agreement.

9. The actions of the Applicants clearly demonstrates that the Guarantors are at liberty to enforce their securities and have never been unfairly restricted throughout the period of the restraining order.

10. The Application would like to seek the Honourable Courts consent to allow the Guarantors to enforce their securities and allow the Applicants to continue with the restructuring with the Restraining Order extended to 31/12/2002.

11. In reply to paragraphs 24 of Wan Kamarul's Affidavit, the Applicants verily believe that the main reason for the 1st Respondent not supporting the extension of the restraining Order is that they want the White Knights to take over all their securities.

12. The Applicants verily believe with the extension of the Restraining Order would provide them the opportunity to seek prospective purchasers for securities charged to the 1st Respondent as this would help the Applicants implement the scheme.

13. The Applicants thereby seek Orders prayed for in this application to extend the Restraining Order to the 31/12/2002.

The Big Picture

Since the restraining order under s. 176 of the Companies Act was obtained by the applicants on 12 August 1998 the said order was extended many times by consent of the parties as the following summary shows:

DATE OF ORDER	APPLICATION FOR EXTENSION OF STAY AND RESTRAINING ORDER
12/8/1998	Restraining and Stay of Proceedings Order pursuant to Section 176(10) of the Companies Act,1965 granted for a period of nine (9) months.
11/5/1999	Interim extension of the Restraining and Stay Order granted pending hearing of the Application for Extension for 1st Respondent's Solicitors to file Affidavit In Reply.

a	21/6/1999	Restraining and Stay Order extended by consent for a period of 9 months.
	27/10/1999	Restraining and Stay Order extended for a period of 5 months.
b	23/3/2000	Restraining and Stay Order extended for a further period of 6 months by consent.
	5/10/2000	Interim extension of the Restraining and Stay Order granted until the 19/10/2000 for the 1st Respondent's Solicitors to seek clients instructions pending hearing of Application.
c	19/10/2000	Restraining and Stay Order extended by consent for 2 months.
	3/1/2001	Interim extension of the Restraining and Stay Order granted pending hearing of Application due to the 1st Respondent's Solicitors request for them to obtain clients instructions.
d	16/1/2001	Interim extension of the Restraining and Stay Order granted until the 5/2/2001 pending hearing of formal Application.
	5/2/2001	Interim extension of the Restraining and Stay Order granted until the 13/3/2001 pending hearing of Application for Extension.
	13/3/2001	Restraining and Stay Order extended for 6 months until 30/6/2001.
e	29/6/2001	Application for Extension of Restraining and Stay Order adjourned at the request of the 1st Respondent's Solicitors.
	2/8/2001	Application for Extension of the Restraining and Stay Order allowed by consent.
f	1/11/2001	Interim extension of Restraining and Stay Order pending hearing of Application.
	3/12/2001	Application for Extension of Restraining and Stay Order granted by consent.
g	3/6/2002	Interim extension of Restraining and Stay Order pending hearing of Application.
	25/6/2002	Interim extension of Restraining and Stay Order pending hearing of Application.
h	11/7/2002	Interim extension of Restraining and Stay Order pending hearing of Application.
	15/8/2002	Interim extension of Restraining and Stay Order pending hearing of Application.

i

28/8/2002 Interim extension of Restraining and Stay Order pending hearing of Application.

4/9/2002 Interim extension of Restraining and Stay Order pending hearing of Application.

Ruling

As the above summary shows, the order to convene the meeting with their shareholders and the restraining order had been in existence since 12 August 1998 (over four years) and despite the many extensions obtained by the applicants they had failed to date to come up with a firm compromise or arrangement or for that matter any semblance of one.

It is clear from the affidavits of Rickie Tang that the proposed scheme of arrangement and compromise had failed. What the applicants are now attempting to do in this application, is merely to keep the original restraining order under s. 176(10) which they had obtained some four years back, operative until such time as they are able to find persons who are prepared to inject assets into the companies in a scheme of arrangement which they would then submit for approval to the relevant authorities and their shareholders and creditors.

This unfortunately, is not the object of s. 176 of the Act.

A court may make the order convening the meeting of the parties under s. 176(1) only – where a compromise or arrangement is proposed between a company and its creditors, or between the company and its members. The applicant is required to satisfy the court of the feasibility and merits of the proposed scheme of compromise before making an application under s. 176 of the Act. See *Re Kuala Lumpur Industries Bhd & Ors* [1991] 3 CLJ 2867; [1991] 3 CLJ (Rep) 86 where VC George J approved and followed the views of Sholl J in *Re GAE Pty Ltd* [1962] VR 252 at 256, with respect to the making of the order of a meeting of creditors or members of a company under s. 176(1) and the restraining order under (10) of the Companies Act 1965 as follows:

> (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them the Court may on the application in a summary way of the company or of any creditor or member of the company, or in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the Court directs.

(10) Where no order has been made or resolution passed for the winding up of a company and any such compromise or arrangement has been proposed between the company and its creditors or any class of those creditors, the Court may, in addition to any of its powers, on the application in a summary way of the company or of any member or creditor of the company restrain further proceedings in any action or proceeding against the company except by leave of the Court and subject to such terms as the Court imposes.

It follows that both the order to convene the meeting under s. 176(1) and the restraining order under s. 176(10) of the Act are good only for the original purpose for which they were granted based on the proposed compromise or arrangement which was put before the court then.

It is therefore an abuse of the process of the court bordering on contempt for the applicants to apply for extension of the orders when the proposed arrangement or compromise had failed. If they are desirous of entering into a new arrangement or compromise as they are now attempting to do with a new set of 'white knights', it would be incumbent upon the applicants to submit a new proposal to the court setting out the viability of the scheme which they have in mind for its consideration.

But even assuming the unlikely – that s. 176 does allow the applicants to apply for an extension of the meeting of creditors or shareholders notwithstanding that the proposed compromise or arrangement had fallen through, there is hardly any reason to allow any further extension in this case, considering that the applicants had failed to reach any arrangement or compromise after some four years. To allow the extension would tantamount to providing an unlimited protection to the applicants contrary to the purport of s. 176 to the prejudice of:

i. its own shareholders who have every right to expect that what remains of the applicants' assets be not further eroded by their continued existence and,

ii. its creditors who have been kept at bay from recovering their debts for so long.

Indeed, under s. 176(10A) of the Act the court may grant a restraining order under sub-s. (10) to a company for a period of not more than ninety days or such longer period as the court may for good reason allow if and only if:

(a) it is satisfied that there is a proposal for a scheme of compromise or arrangement between the company and its creditors or any class of creditors representing at least one-half in value of all the creditors;

(b) the restraining order is necessary to enable the company and its creditors to formalise the scheme of compromise or arrangement for the approval of the creditors or members pursuant to sub-s. (1);

(c) a statement in the prescribed form as to the affairs of the company made up to a date not more than three days before the application is lodged together with the application; and

(d) it approves the person nominated by a majority of the creditors in the application by the company under sub-s. (10) to act as a director or if that person is not already a director, notwithstanding the provisions of this Act or the memorandum and articles of the company, appoints the person to act as a director.

It is clear that none of the above conditions (a) to (d) apply in the instant case.

The application is dismissed with costs.